JOSEPHINE YII CHUI LENG v. PUBLIC PROSECUTOR

[R.Cr.J. (Tan Chiew Tong J.) June 4, 1973]

[Sibu — Criminal Revision No. 5 of 1973]

Road Traffic — Using a motor vehicle without third party risks insurance in force —Driving motor vehicle with expired licence — Motor Vehicles (Third Party Risks) Ordinance (Sarawak Cap. 130) s. 3(1).

The appellant had pleaded guilty to the charges of driving a motor vehicle without a valid driving licence and using a motor vehicle without being covered by third party risks insurance. She subsequently appealed against her conviction on the second charge. On an objection by the Deputy Public Prosecutor as to the right of the appellant to appeal, the court decided to deal with the case in revision. Evidence was received by the High Court in regard to the insurance policy and the certificate of insurance and also from the representative of the insurance company, who stated that the company regarded the insurance policy as still being in force at the date of the alleged offence.

Held: (1) although in the absence of evidence from the representative of the insurance company, the court would have held that the insurance policy was not in force as the appellant was disqualified by enactment from driving the motor vehicle, nevertheless taking into account the evidence of the insurance company's representative, it appeared that at the material time the motor vehicle was used by the appellant, she was still covered by the insurance policy;

(2) the conviction and sentence on the second charge must therefore be quashed.

Cases referred to:-

(1) *Ngiam Siang Eng* v. *Reg.* [1952] S.C.R. 3.

(2) *Edwards* v. *Griffiths* [1953] 1 W.L.R. 1199.

(3) *T.S.B. Maniam* v. *Public Prosecutor* [1946] M.L.J. 39.

(4) *Reg.* v. *Tan Hong Heng* [1965] 1 M.L.J. 124.

(5) *Mumford* v. *Hardy* [1956] 1 W.L.R. 163.

(6) *Tan Kwang Chin* v. *Public Prosecutor* [1959] M.L.J. 252.

(7) *Public Prosecutor* v. *Lim Ching Chuan* [1972] 1 M.L.J. 27.

(8) *Public Prosecutor* v. *Albert See* [1971] 1 M.L.J. 47.

(9) *Public Prosecutor* v. *Nasir* [1972] 2 M.L.J. 39.

(10) *In re Raja Azhar bin Raja Haji Ahmad* Penang Criminal Revision No. 9 of 1956.

CRIMINAL REVISION.

Chew Peng Cheng for the appellant.

Wan Madziki Mahdzar (Deputy Public Prosecutor) for the respondent.

Tan Chiaw Thong J.: At the outset of this appeal the learned Deputy Public Prosecutor raised a preliminary objection on the right of the appellant to appeal against her conviction after she had pleaded guilty in the lower court to the second charge in relation to the use of a motor vehicle without being covered by third party risks insurance. There was no appeal against the conviction on the first charge of driving a motor vehicle without a valid driving licence.

Since the learned Deputy Public Prosecutor's objection presupposes the validity of the second charge which was challenged by the appellant, counsel for both parties were asked to address arguments to the court on this point. At the end of the arguments, I ruled that the second charge was not bad for duplicity as contended by the appellant. Submissions were then made by both parties on the objection raised by the learned Deputy Public Prosecutor, at the end of which counsel for the appellant informed the court that he was abandoning the appeal and requested the court in the circumstances to exercise its powers of revision. In view of the state of the authorities relevant to the matter, the court considers that this is a fit case for revision in order to consider whether a revisionary order should be made.

The insurance policy and the certificate of insurance covering the motor vehicle at the material time were not produced before the lower court but they are now before this court. Judicial authorities both locally and in England, one of which is *Ngiam Siang Eng* v. *Regina*[1] and another is *Edwards* v. *Griffiths*[2] have stressed the desirability where a charge similar to the one under appeal is being tried before the court of having the insurance policy and certificate of insurance concerned before the court. This is obvious in view of the fact that technical points might arise as in the instant case. Magistrates should therefore take note of this.

The facts in this case are simple. The appellant was found driving a motor vehicle with an expired driving licence although the insurance policy covering that vehicle was still in force. The sole point in issue is whether this insurance policy covered the act of the appellant of using that motor vehicle whilst in possession of an expired driving licence.

The relevant part of the insurance policy authorised the following persons to drive the motor vehicle by the following provisions: —

"Authorised driver:

Any of the following:—

(a) the insured.

(b) any other person who is driving on the insured's order or with his/their permission.

Provided that the person driving is permitted in accordance with the licensing or other laws or regulations to drive the mother vehicle or has been so permitted and is not disqualified by order of a court of law or by reason of any enactment or regulation in that behalf from driving the motor vehicle."

In the certificate of insurance instead of using the words "authorised driver" as appeared in the policy of insurance, the words "persons or classes of persons entitled to drive" were used. For the purposes of these proceedings, I do not consider that the difference in wording makes any material difference. At the outset I would express the view that the proviso appearing in the place where it is both in the policy of insurance and in the certificate of insurance, there is no doubt that that proviso applies to the persons who are authorised to drive under the policy of insurance as well and not only to the second category, *i.e.* "any other person who is driving on the insured's (or policyholder's) order or with his/their permission".

There appears to be conflicting authorities in Malaysia and Singapore where similar provisions in similar policies of insurance were considered before the court. There are also authorities which emphasised the necessity of the prosecution to prove that the relevant policy of insurance was not in force at the

time of the user (see *T. S. B. Maniam* v. *Public Prosecutor*[3] and *Reg.* v. *Tan Hong Heng*[4]). It is true that in the instant case the appellant had pleaded guilty unequivocally as I have already held and therefore there was no question of calling upon the prosecution to prove that the policy was not in force in relation to the user of the motor vehicle at the time of such user. However, in view of the state of the conflicting authorities with which I shall deal later and the technical nature of the offence against the appellant in view of the facts, I have allowed to be taken the evidence of Mr. Chiong Wai Meu, the manager of the Kuching Branch of the appellant's insurers. This evidence confirmed that on the date of the offence charged against the appellant, *i.e.* 2nd January, 1973, her policy of insurance covering third party risks was still in force and that the insurers would consider itself on risk in relation to the user of the motor vehicle concerned by the appellant on such date, and accordingly she was then covered against third party risks even though her driving licence had expired on that date. Mr. Chiong stated that this has been confirmed from the head office of his company. I consider that this evidence is relevant since the intention of section 3(1) of the Motor Vehicles (Third Party Risks) Ordinance (Cap. 130) is to prevent persons from using motor vehicle without being covered by third party risks insurance and it is material to consider here whether the relevant policy of insurance in fact covered the appellant against third party risks at the material time. If she was covered then the mischief which the law seeks to prohibit does not arise. I do not consider in the circumstances that it would be correct to base my decision solely on the construction of the policy of insurance. This view would appear to be supported by the case of *Mumford* v. *Hardy*[5] where the admission of evidence from a representative of the insurance company concerned before the justices was not disapproved by the Queen's Bench Division sitting as an appellate court; and the same view was expressed by Chua J. in *Reg.* v. *Tan Hong Heng, supra,* where at page 127 he said: —

"In this case as the prosecution had failed to satisfy the magistrate beyond reasonable doubt that there was no policy of insurance in force by not calling a representative of the insurance company as to whether or not they considered themselves on risk, the magistrate was in duty bound to give the benefit of the doubt to the respondent and find him not guilty."

As Horne J. said in the *T. S. B. Maniam's* case, *supra,* at page 40: —

"... all the prosecution do is to ask the Magistrate to construe an offence out of the terms of the insurance certificate and the conditions of the licence. This method lacks the certainty demanded by law when a penalty is to be imposed upon the subject. It must be proved beyond reasonable doubt that there was no policy in force and until the policy has in fact been avoided by the insurer no Magistrate can safely convict solely on an admission of the breach of the condition of the licence."

The conflicting authorities referred to earlier are the cases of *Tan Kwang Chin* v. *Public Prosecutor*[6] and *Public Prosecutor* v. *Lim Ching Chuan,*[7] both Malaysian cases on the one hand and the cases of *Public Prosecutor* v. *Albert See*[8] (Singapore High Court case) and *Public Prosecutor* v. *Nasir*[9] (Malaysian High Court case) on the other. In all these cases the relevant proviso which was considered was in identical terms to that in the instant case. In *Tan Kwang Chin's* case the appellant was an "L" driver of a motor car which he drove with the consent of the owner who had a policy of insurance covering third party risks at the material time. The learned judge held that as the appellant was driving the car with the permission of the policy holder he was within the category of person who "has been so permitted and is not disqualified by order of a court of law or by reason of any enactment or regulation in that behalf from driving the motor vehicle", despite the fact that the appellant was driving with an expired provisional driving licence. The learned judge based his decision on the English cases of *Mumford* v. *Hardy, supra,* and *Edwards* v. *Griffiths, supra,* and on the judgment of Rigby J. in Penang Criminal Revision No. 9 of 1956.[10] It is to be noted however that in the two English cases mentioned, the court was also concerned with whether the driver was "disqualified for holding or obtaining" a licence to drive the vehicle concerned. The wordings of the proviso in the Penang case and in the *Tan Hong Heng's* case, *supra,* were also similar to those in the English cases (see *Tan Kwang Chin's* case and the *Albert See's* case). Under the relevant proviso in the instant case before the driver can be considered as being covered under the policy of insurance, she must be either permitted to drive in accordance with the licensing or other laws or regulations to drive a motor vehicle or has been so permitted *and* is not disqualified (a) by order of a court of law *or* (b) by reason of any enactment or regulation in that behalf, from *driving* a motor vehicle. The learned judge in the *Tan Kwang Chin's* case does not appear to have considered the second limb of the disqualification provisions in the proviso as indicated above, *i.e.* whether the appellant was disqualified "by reason of any enactment or regulation in that behalf from driving the motor vehicle" and it is not clear whether the learned judge had fully considered it in the case of *Lim Ching Chuan.* In the *Albert See's* case the learned Chief Justice considered the legal effect of the above second limb and held, *inter alia,* that if a learner driver, whether or not he displays "L" plates "drives" his motor vehicle on the road after his provisional driving licence has expired, he is disqualified by reason of section 13(1) of the Singapore Road Traffic Ordinance, 1961, from "driving" it and he has thereby broken a term of the insurance policy and was therefore not covered by the insurance policy. In my view the same position would apply in the case of a driver driving with an expired driving licence. At this stage it is to be observed that section 13(1) of the Singapore Road Traffic Ordinance, 1961 is in substance similar to the provisions of section 18(1)(a) of our Road Traffic Ordinance, 1960. The learned Chief Justice in the *Albert See's* case distinguished *Tan Hong Heng's* case since the latter case was concerned with the proviso which deals with the "disqualification for holding or obtaining" a driving licence as distinct from a disqualification from "driving a motor vehicle". The relevant part of the judgment reads as follows: —

"The proviso construed in the English cases (i.e. *Edwards'* case and the *Mumford's* case — words within brackets added) refers to the holding of a licence to drive and to the dis-

qualification for holding or obtaining a licence to drive whereas the proviso to be construed in the present case is completely different and refers, not to the holding of a licence to drive, but to the permission to drive, and to disqualification, not for holding or obtaining a licence to drive, but from driving."

The judgment in the *Tan Kwang Chin's* case was dissented from in that case. In the *Nasir's* case *supra*, although the learned judge stated that the magistrate whose decision was under revision has misconstrued the decision in the *Tan Kwang Chin's* case (at page 39), he stated (at page 40) that: —

"In my view *Tan Kwang Chin's* case cannot be regarded as an authority to support the contention that a driver who had an expired provisional driving licence is still covered by the terms of his insurance."

As indicated earlier, I am of the view that, for present purposes, there would appear to be no difference between driving with an expired provisional driving licence and driving with an expired driving licence.

Mr. Chew has submitted that, as regards the proviso in the instant case, there appears to be two limbs to that part of the proviso regarding disqualification and that, so long as the appellant is able to show that either limb does not apply to her, then the proviso has no application here. I do not agree. In my view, that part of the proviso regarding disqualification is framed in the alternative and that, so long as it is established that the appellant is caught by either alternative, then she may be regarded as being disqualified from driving.

In the instant case although in the absence of evidence from the representative of the insurance company concerned, I would with respect agree with the decision of Wee Chong Jin C.J. in the *Albert See's* case, nevertheless, taking into account the evidence of the insurance company's representative, I hold that at the material time when the motor vehicle concerned was used by the appellant, she was in fact still covered by the insurance policy. Accordingly, I quash the conviction and sentence against the appellant on the second charge in the lower court. I order that the fine imposed, if paid, shall be refunded to the appellant. I would emphasise that this decision is confined to the particular circumstances of this case. In view of the difficulties created by the wording in the proviso, it is a matter for consideration whether insurers should have that wording amended, if their intention, as here, is to cover the insured person whilst driving with an expired driving licence.

One matter which calls for attention is in relation to the wording of the second charge before the lower court. Section 3(1) of the Motor Vehicles (Third Party Risks) Ordinance (Cap. 130), *inter alia*, prohibits a person from *using* on a road a motor vehicle without third party risks insurance in relation to such user. The charge in the instant case used the word "drive" which is incorrect but I hold that this irregularity did not operate to the prejudice of the appellant and is curable under the provisions of section 331 of the Criminal Procedure Code. Further, the charge also alleged that the appellant used the motor vehicle concerned without "a policy of insurance or such a security in respect of third party risks..." Although I have held that this does not amount to duplicity in the charge, I would draw the attention of police officers that where the prosecution is in a position to particularise as to whether the allegation against the appellant was that there was not in force *either* "a policy of insurance" *or* "such a security" in respect of third party risks then the specific allegation should be made. In this particular case it seems clear from the case record that the prosecution knew that the coverage of third party risks concerned was an insurance policy and the addition of the words "or such a security" in the charge is not only unnecessary but tends to raise arguments as has happened here.

Conviction and sentence quashed.

PALANIAYEE & ANOR. v. TOH WHYE TECK REALTY LTD. & ANOR.

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.) July 12, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 131 of 1972]

Negligence — Dangerous operation — Felling of trees — Duty of care — Workmen's Compensation Ordinance, 1952, s. 8.

In this case a rubber tapper had been employed to assist a mandore in felling old or diseased trees. The mandore used for the purpose a mechanical chain saw. The tapper was killed by the fall of a tree, which fell in his direction. His widow claimed damages on behalf of herself and her children. The trial judge ([1973] 1 M.L.J. 34) dismissed the claim as he held the deceased was solely to blame for the mishap. On appeal,

Held: (1) the mandore had not done all he should to see that the deceased was safely outside the danger area and therefore had failed in the duty of care he owed to the deceased;

(2) there was contributory negligence on the part of the deceased and both of them were equally to blame.

Case referred to:-

(1) *Donoghue* v. *Stevenson* [1932] A.C. 562, 580.

FEDERAL COURT.

Atma Singh Gill for the appellants.

V. C. George and *S. Ponniah* for the respondents.

Ong C.J.: A rubber-tapper was employed overtime to assist his mandore in felling old or diseased trees. The mandore used for this purpose a mechanical chain saw. After about two months' experience in this type of work, the tapper was killed by the fall of a tree, which was partially hollow and fell in a direction somewhat unexpected. His widow claimed damages on behalf of herself and the infant children of the deceased who were dependent on him. The claim was dismissed as the trial judge was of the opinion that the deceased was the author of his own misfortune solely due to his own negligence.

This appeal raises two main grounds: first, that the learned trial judge misdirected himself in finding the mandore in no way to blame and, in the alternative, that in any event the plaintiffs were entitled to award